U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 June 2003

CASE NO.: 2002-LHC-2638
OWCP NO.: 1-154644

In the Matter Of:

REAGAN BURRELL
Claimant

v.

ATKINSON CONSTRUCTION CO.
Employer

and

TRAVELERS INSURANCE CO.
Carrier

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for worker's compensation benefits filed by Reagan Burrell ("the Claimant") against his employer, Atkinson Construction Co. ("Employer"), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing. That hearing was conducted before me in Portland, Maine, on March 20, 2003, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and its insurance carrier, Travelers Insurance Co. The Claimant testified at the hearing, as did Christopher Temple, a Certified Rehabilitation Counselor, who testified on behalf of the Employer. Documentary evidence was admitted without objection as: Claimant's Exhibit CX 1-22; Employer's Exhibits EX 1-5; and a stipulation sheet executed by counsel for the Claimant and Employer, which will be received into evidence as Joint Exhibit JX-1. After the hearing, Claimant offered an updated medical report from Dr. Karyn L. Woelflein, dated February 19, 2003, which is hereby designated as Exhibit CX-23 and received into evidence. Employer submitted the deposition of Dr. Robert N. Phelps after the hearing. That document is hereby received into evidence as Exhibit EX- 6. Post hearing briefs were authorized and received from the Claimant and from the Employer.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant was born on October 7, 1952, graduated from high school, and worked in mechanical trades. He switched jobs often and was occasionally out of work between jobs. Tr. at p. 36. In 1999, he joined the millwrights union, and began work as a pile driver at the Atkinson project at Bath Iron Works, on February 1, 2000. This position required a lot of heavy lifting. He worked on a barge and on land close by the water, driving piles for concrete and cement piers. On July 20, 2000, Claimant stated that he sustained an injury while falling as a result of the heel and toe of his boot falling through a rebar. He fell forward, but caught himself on an I-beam before landing. He experienced an instant pain going from his left hip down to his leg. *Id.* at p. 19. He was treated at the Urgent Care Center at Midcoast Hospital by Dr. Parker, who advised him to perform only modified duty with no lifting and bending. *Id.* at p. 38. He was out of work for about 2 months as a result of this injury, upon the recommendation of Dr. Caccamo. He received state workers compensation benefits and then returned to work at the end of September. *Id.* at p. 20.

He testified that the pain continued when he returned to work, where he was assigned to carpentry work, but continued to carry the pile driver title. He claimed to have received verbal restrictions from his doctor to "be careful and get help with any lifting or anything you might have to do like that." *Id.* p. 21. He was assigned to a lead man who allowed him to work as he could, not doing any heavy lifting, and little bending or climbing.

He was laid off on January 2, 2001. At that time, his leg continued to bother him a lot. He was unemployed for awhile and then worked at various jobs. He worked for two days setting up staging, which he stated did not go well in that he could not do climbing. He worked for several months at Madawaska for Sullivan and Merritt as a ground man. He was laid off from this position and stated that he was told by the safety man that "he was not going to keep anybody around who's hurt when he's got able men there." *Id.* at p. 25. He claims to have aggravated his back injury while on this job, while bending over to pick up a two by four piece of lumber. He was sent to a clinic and treated by Dr. Eino and by Dr. Knawthell in Bangor. He also worked at KCS in Woodland for a few days. Because his leg continued to bother him, he decided to stay out of work to take a rest, and remains out of work. *Id.* at p. 27.

Claimant testified that he contacted the employers identified in a labor market survey introduced by Employer (Exh. EX-2). He told the employers that he had certain restrictions as to bending and lifting over 30 pounds and was on Worker's Compensation. *Id.* at p. 49-51. However, Claimant was unable to identify any doctor that told him to avoid the activities that he self-reported as causing him difficulties (Exh. CX-12). *Id.* at p. 53. He stated that the position identified at Sheraton Four Points hotel would require lifting weight over his restrictions and that he could not perform that job. *Id.* at p. 29. The job at Budget Rent-a-Car was already filled and would have required bending and washing cars, which he claims he could not do. The job at Brewer Automotive was unavailable and would have required lifting over 50 lbs. Mr. Quicks Oil Lube required bending and lifting beyond his restrictions, he claimed. Edwards Systems Technology said they might be able to match him up with a job and referred him to a job fair. The job at Darling's Ford had been filled and also would have required bending and lifting. *Id.* at p. 29-30.

He also contacted five other potential employers (Exh. CX-11) about possible opportunities for employment and received negative replies. He had no idea if these businesses, mainly automotive suppliers, were hiring, but made cold calls because he believed that he might be able to do the kind of work they had at these establishments. *Id.* at p. 58-66.

Claimant treats with Dr. Karen Woelflein who prescribed a medication the Claimant could not identify. He was also referred to Dr. Almsburg, a neurosurgeon, by Dr. Caccamo in July, 2002. *Id.* at p. 45. Dr. Almsburg referred Claimant to Dr. Woelflein. He claims to also suffer from depression, for which Dr. Woelflein prescribed an anti-depressant medication. *Id.* at p. 46. He continues to experience hip pain and needs to lie down often to deal with the pain. *Id.* at p. 34.

Vocational Evidence

Christopher Temple, a Certified Rehabilitation Counselor, testified on behalf of Employer. Mr. Temple is a vocational professional with experience working with people in an effort to assist them in finding suitable alternative employment once they have suffered injuries in the workplace that affect their ability to perform their usual work. Ex. EX- 5. Mr. Temple prepared a labor market report after reviewing Claimant's deposition, medical records, educational background and work history. He performed a transferable skills analysis. *Id.* at p. 69. He understood the Claimant to have strong mechanical skills, and concluded from the medical evidence that he was at least capable of light to medium work, lifting in the 30 pound range and no repetitive bending. *Id.* at p. 70-71. He based this upon the medical evidence from Dr. Mainen (Exh. EX-1) and Dr. Phelps (Exh. CX-13), which he found not inconsistent with his own conclusions. *Id.* He identified several jobs that were consistent with the Claimant's work history, transferable skills and physical capacity. *Id.* at p. 71, Exh. EX-2. He stated that he made personal contacts with these sources, that the jobs were available, and that the restrictions he identified for the Claimant would not preclude employment. *Id.* He further testified that the physical requirements of these positions as described to him by the employers were inconsistent in some cases with the testimony of the Claimant. *Id.* at p. 72. He also identified jobs that would be available to the Claimant if Dr. Mainen's conclusions about restrictions were to be believed. These jobs included millwright, truck mechanic, working with woodworking equipment and heavy equipment truck mechanic. *Id.* at p. 73.

Medical Evidence

Dr. Robert Phelps (Exh. CX- 13)

Dr. Phelps examined the Claimant at the request of his attorney. He found that the Claimant suffered from bilateral meralgia parastetica, piriformis syndrome of the left hip, with a mild radicular component in the left leg. He found that the Claimant also was depressed as a result of his condition.

He found the left hip condition to be definitely causally related to his July 20, 2000 injury, and states that it is not clear that the myalgia paresthetica is anything other than idiopathic. He recommended continued activity modification and medication, treatment for depression, and vocational rehabilitation. He found that the Claimant had the capacity for light duty work. He found the

Claimant should not lift or carry over 25 pounds, and could occasionally bend, climb, kneel, stoop, push/pull, and reach above the shoulder. He concluded that the Claimant had reached maximum medical improvement and placed him in the DRE Lumbar Category II for a 5% whole body impairment, under the AMA Guides, 5th Edition. Dr. Phelps further commented on and attempted to reconcile a report from Dr. Mainen, which Dr. Phelps felt unfairly cast the Claimant as a possible malingerer. He also felt that Dr. Mainen misdiagnosed what was in fact meralgia paresthetica, and attributed it to limitations of modern medicine. He described the downward spiral that patients with physical pain and related depression sometimes fall into.

Dr. Michael W. Mainen (Exh. EX- 1)

Dr. Mainen examined the Claimant at the request of Employer. He found left flank/iliac crest and left leg pain of undetermined etiology. He noted that an MRI scan showed no disc abnormalities, and that he could find no objective basis to support the Claimant's pain symptoms. He suspected malingering and complaint exaggeration. If there is in fact an organic basis for the pain, he would attribute it to the injury at Atkinson, the injury at Sullivan and Merritt and the Claimant's own firewood gathering. He concluded that the Claimant is capable of at least light to light medium work, which would entail lifting in the 30 pound range and no repetitive bending. He recommended further MRI and EMG testing, which, if negative, would remove any limitations on work

Dr, Caccamo (Exh. CX- 15)

Claimant treated with Dr. Caccamo from August, 2000 to October, 2002. He diagnosed Claimant with chronic low back pain with lumbosacral strain and somatic dysfunction of the thoracic and lumbosacral area. He performed an MRI, X-rays and an abdominal ultrasound, all of which were negative. He returned Claimant to work on September 26, 2002.

Dr. Ormsberg (Exh. CX- 18)

In a report dated September 4, 2002, Dr. Ormsberg found Claimant presented with intermittent left leg radiating pain in the sciatic distribution. He found no neurological deficit. He noted an negative examination and a negative MRI, and was at a loss to explain the picture of pain Claimant presented. He found no structural problem involving the lumbar spine.

Dr. Nawfel (Exh. CX- 20)

Claimant was seen for a osteopathic manipulation therapy evaluation on Nov. 27, 2001. He found somatic dysfunction of the pelvic, lumbar and thoracic regions and low back pain. He proceeded to perform a manipulation, which was well-tolerated.

Dr. Woelflein (Exh. CX- 21)

This report from the Inland Hospital Physiatry Clinic resulted in the following diagnosis: Chronic left lower extremity pain, question of chronic pain syndrome, question depression, and alcohol abuse. She prescribed a Medrol Dosepak, to be followed by Neurontin and Celebrex, as required. She ordered an MRI to be followed by an EMG, if required, and possible referral to Dr.

Zolper for an epidural injection.

ISSUES

The parties have stipulated to the following:

1. The Act applies to this claim.

2. The injury occurred on July 20, 2000.

3. The injury occurred at Bath Iron Works construction site.

4. The injury arose out of and in the course of the Claimant's employment with Employer.

5. There was an Employer/Employee relationship a the time of injury.

6. The Employer was timely notified of the injury.

7. The claim for benefits was timely filed.

8. The Notice of Controversion was timely filed.

9. The informal conference was conducted on July 18, 2002.

10. The Claimant's average weekly wage was $997.00

11. Compensation has been paid as follows:
    Temporary Total Disability from July 21, 2000 to September 27, 2000 at $458.83.

Issues that remain contested are causation and the nature and extent of disability.

Positions of the parties

Claimant seeks the following relief:

1. An order establishing the compensability of Claimant's July 20, 2000 injury;

2. An award of temporary total compensation benefits on an ongoing basis with an offset for earnings;

3. An award of outstanding medical bills.

Continuing Causation

Claimant first notes that Employer agrees that he sustained a work-related injury on July 20, 2000, and that he was temporarily totally disabled from July 21, 2000 to September 27, 2000. He

received voluntary payments under the State Act for this period, for which Employer should receive credit, according to Claimant.

It is next argued by Claimant that his case is governed by the Section 920(a) presumption, which provides Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which would have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Claimant contends that this presumption can be rebutted only by substantial evidence to the contrary, and that this has been interpreted to require evidence that negates the connection between the alleged event and the alleged harm, citing *Caudil v. Seatac Alaska Shipbuilding*, 25 BRBS 92 (1991), where testimony of a medical expert that the injury did not play a significant role in the claimant's problems was deemed to be insufficient to rebut the presumption. Here, Claimant maintains that the testimony of Dr. Mainen introduced by Employer is insufficient to rebut the presumption because Dr. Mainen is equivocal as to causation. At one point in his testimony, Dr. Mainen attributes a share of the cause for Claimant's pain to Employer, along with a subsequent employer and Claimant's own activities. Exh. EX- 1 at pp. 8-9. Claimant is also critical of Dr. Mainen's credibility judgments, as to Claimant's possible malingering and exaggeration of symptoms, as well as the Doctor's commenting on the believability of Claimant's description of the level of work compared to that of another observer. *Id.* These inappropriate comments undermine the integrity of his report, Claimant suggests. Claimant also emphasizes Dr. Mainen's inability to diagnose Claimant's condition, and the fact that the Doctor does not comment on the Claimant's depression in his report. It is argued that evidence as to the Claimant's depression is unrebutted. Claimant concludes that Employer has failed to rebut the presumption provided to him under the Act.

Employer argues that Claimant experienced a full and complete recovery from symptoms associated with what it describes as "a simple twisting episode onJuly 20, 2000." Employer's Brief at p. 4. It further maintains that the Claimant's testimony is not credible and is at odds with the medical records. Claimant's nine visits to Dr. Caccamo between August and October of 2000 reported low back pain, not hip pain, Employer contends. There is only one reference to hip pain, according to Employer, in a note on Sept. 12, 2000. Those visits were followed by a year without any medical treatments, until October, 2001, when the Claimant suffered a new, "although equally trivial" injury at Sullivan & Merritt. Employer's Brief at p. 5.

With regard to the Claimant's contention that he never experienced a meaningful recovery from the original injury, Employer argues that records from Dr. Nawfel on November 21, 2001 state that the Claimant reported resolution of the injury and a return to usual pain-free status in presenting his history to Dr. Nawfel. His subsequent injury at Sullivan & Merritt was also reported by Claimant as having been resolved in Dr. Nawfel's record of a December 18, 2001 visit, according to Employer. Employer observes that the Claimant did not see any physician after that date until July 13, 2002. Employer concludes that the Claimant's position that he did not fully recover from his original injury lacks credibility in light of medical records indicating the contrary and the absence of medical treatment for large periods of time.

Nature and Extent of Incapacity

Claimant seeks temporary total benefits with an offset for the intermittent periods of earnings based upon a prima facie case of total disability. Claimant relies on the opinion of Dr. Phelps who opined that Claimant should not return to work as a carpenter/millwright/mechanic because those activities are too strenuous for his physical condition. Exh. CX- 13, at p. 18. Dr. Phelps felt that the Claimant had the capacity for light duty work, but required vocational rehabilitation. *Id.*

Employer attempted to rebut this evidence by introducing labor market evidence that demonstrated the availability of realistic suitable alternative employment. *Harmon v. American Marine Corp*. 21 BRBS 305, 311,312 (1988). Employer has not contended that Claimant could return to work in its facility. Claimant argues, however, that Employer's expert has failed to establish the availability of realistic suitable alternative employment opportunities within the experience and capabilities of the Claimant. Claimant states the survey was untimely and did not allow time for the Claimant to seek these positions. Moreover, Claimant argues, he attempted to contact some of the employers identified in that survey and found that many of the jobs were outside of his physical capabilities. They also did not account for his depression or his asserted need for vocational rehabilitation to realize light duty potential. Claimant even suggests that some of the suggested jobs, such as heavy equipment/truck mechanic, are absurd, given the Claimant's physical condition.

Employer argues that any disability that Claimant is found to have should be considered partial and not total. It refers to labor market evidence that it introduced that establishes the availability of suitable work for the Claimant. Employer notes the Claimant's past willingness to work long distances from his Palmyra home and argues that he cannot be heard to argue that the jobs identified by the survey are too remotely located. Claimant's arguments that he could not perform the physical demands of many if not all of the identified jobs are not credible, according to the Employer. At most, Employer contends, the claim should be limited to an award of benefits for temporary partial disability, based upon a capacity to earn at least $8.00 per hour for a forty hour week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Continuing Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita, supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier, supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Rajotte v. General Dynamics*

Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1981); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Holmes*, *supra*; *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986).

Here, I find that the presumption has been satisfied in that the Claimant has proved that he suffered a harm, namely back and hip pain, and that the injury was caused by an accident at the Employer's job site on July 20, 2000, when Claimant caught his foot in a rebar. He was treated at the emergency room for this injury and diagnosed with lumbar myofascial strain secondary to work activity. Exh. CX- 14. Medical records also provide *prima facie* evidence of the continuing nature of the pain, although this is contested, as discussed below. See Exhs.14 at p. 12, 16, and 21.

Evidence to rebut the presumption here has been offered by the Employer in the form of a medical report from Dr. Mainen, a physician Board-Certified in Occupational Medicine. Dr. Mainen could find no objective basis for the Claimant's pain symptoms, and suspected malingering and complaint exaggeration. He did state, however, that if there was an organic basis for the Claimant's pain, he would attribute it to one of three causes, the accident at the Employer's job site, the subsequent injury at Sullivan & Merritt, or the Claimant's firewood gathering activities. Claimant has suggested that, because of this statement, Dr. Mainen's report is equivocal as to causation. Claimant also criticizes the credibility determinations contained in the Doctor's report, because they are outside of his responsibility and expertise. Finally, Claimant observes that Dr. Mainen failed to discuss Claimant's depression, which was questioned in a report of Dr. Woelflein, and later diagnosed by Dr. Phelps.

While I agree with Claimant that Dr. Mainen's report attempts to ascertain credibility and contains value judgments outside of his expertise, it is nevertheless sufficient, in my judgment, to rebut the Section 20(a) presumption because it contains medical opinions and conclusions that rebut the Claimant's theory of the case. He was unable to find a basis for the Claimant's pain and provided an opinion that disagrees with the primary pain diagnosis suggested by the Claimant (piriformis syndrome). This necessitates an evaluation of the record as a whole to determine causation.

That evaluation is hereby resolved in the favor of the Claimant, because the weight of the evidence supports the conclusion that he suffered from leg and hip pain caused by his original injury at the Employer's work site in July 20, 2000, and that pain was never fully resolved. In making this finding, I credit the testimony of Dr. Phelps, who diagnosed bilateral meralgia parastetica, piriformis syndrome of the left hip, and depression. The diagnosis of piriformis syndrome, which he found definitely causally related to the July 20, 2000 injury, is not only the product of Dr. Phelps' own considerable expertise, but is supported by the records of the physical therapist, who indicated that Claimant tested positive for piriformis five days after the injury (Exh. CX- 14 at unnumbered page following p. 82), and by the records of Dr. Ormsberg, who left open the possibility that piriformis syndrome is the cause of Claimant's pain. Exh. CX- 18. I find this evidence persuasive as to causation.

I did not find Dr. Mainen's report to be a particularly helpful addition to this record. As noted

above, Dr. Mainen was unable to diagnose the Claimant's condition, from which he was led to suspect malingering and complaint exaggeration. I find that Dr. Mainen's conclusions may have been unduly influenced by judgments that he made about the Claimant's character, at one point accusing the Claimant of surreptitiously tape-recording the examination. He also made credibility findings outside of his area of expertise (as to the believability of he Claimant's description of the difficulty of work at a particular job) that may have influenced his conclusions. Further, Dr. Mainen's report is indeed equivocal in that he finds that there is no organic basis for the Claimant's symptoms, then suggests that, if there is an organic basis, one of the causes might be the injury at Employer's work site. Dr. Mainen also fails to mention Claimant's possible depression, noted by Dr. Woelflein in October, 2002, and later confirmed by Dr. Phelps. The Claimant's possible depression was confirmed by his gloomy and somber demeanor at the hearing, where he answered questions in a sullen, and sometimes abrupt manner.

On balance, I find that the conclusions in the report of Dr. Phelps are more plausible and consistent with other medical evidence. Accordingly, they deserve and I accord them greater weight those in the report of Dr. Mainen.

Employer made much of an inconsistency in references to the location of Claimant's pain, in that references are made to leg pain, hip pain and/or butt pain in various documents and reports. Employer is suggesting that Claimant was complaining of leg pain more than hip or butt pain. This problem has been resolved to my satisfaction in the deposition of Dr. Phelps, where he discusses the note taking discipline of physicians, concluding that a reference to "leg pain", itself an imprecise locational description, may well encompass the hip or butt area. See Exh. EX-6 at p. 42-46.

Also, there is controversy about whether Claimant's condition was continuous. Employer has made much of the reports of Dr. Nawfel, a Doctor of Osteopathy who performed some osteopathic manipulations on Claimant which suggested that the Claimant reported that his earlier injury had been fully resolved. Employer also suggests that a lack of medical treatment before the second injury in the course of his employment at Sullivan & Merritt provides support for the conclusion that the earlier injury had been resolved. However, there is much in the record that suggests otherwise. Dr. Phelps testified that he believed the Claimant to have had ongoing pain, and that the symptoms following the second incident were fully consistent with the first, suggesting an aggravation of the previous injury. Exh. EX- 6 at p. 65. There is evidence also that the Claimant continued to have discomfort after physical therapy treatments in September, 2000 (Exh. CX-14 at p. 122) and that he reported a two and one half year history of left lower extremity pain to Dr. Woelflein in October, 2002. Exh. 21. I find and conclude that the observations of Dr. Phelps here, that the Claimant has had ongoing pain caused by and related to the original injury at Employer's work site, and that the subsequent injury at Sullivan & Merritt was an aggravation of the prior injury, are reasonable and well supported by the record, and I adopt same.

Nature and Extent of Incapacity

There is no claim for permanent incapacity. The question remains whether benefits should be paid on an ongoing temporary basis, and the amount of such benefits. Claimant has received temporary benefits under the State Workers Compensation statute from July 21, 2000 to September 27, 2000. The parties agree also that Claimant returned to work at Atkinson on September 28, 2000

until he was laid off on January 2, 2001. Claimant is seeking temporary total benefits from July 21, 2000, to the present and continuing, with a credit for benefits which the Employer and its insurance carrier have paid under the State Act, and a further credit for actual earnings after Claimant returned to work on September 28, 2000.

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board* , 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

Claimant relies upon the testimony of Dr. Phelps who found that the Claimant could not return to his former work as a millwright/carpenter/mechanic because the activities associated with those trades are too strenuous for his physical condition. He felt that the Claimant had the capacity for light work, with restrictions as noted in his report, but also found that he required vocational rehabilitation. Exh. CX- 13 at p. 18. Employer sponsored medical testimony from Dr. Mainen concludes that the Claimant is at least capable of light to light medium work, lifting up to 30 pounds, with no repetitive bending. Exh. EX- 1.

Employer attempted to rebut Dr. Phelps conclusions by offering labor market evidence to demonstrate the availability of realistic suitable alternative employment. A labor market survey dated March 4, 2003, prepared by a Certified Rehabilitation Counselor, Christopher O. Temple, found six positions which he claimed were suitable and available jobs for the Claimant, after reviewing the Claimant's medical and vocational records. Exh. EX - 2. He accepted the restrictions suggested by Dr. Mainen, which were that the Claimant could perform light to light-medium work, lifting up to 30 pounds, with no repetitive bending. He testified that these jobs were available at the time of his survey. He also concluded that the Claimant could find available millwright, truck mechanic, and woodworking positions, if he could perform such jobs, as Dr. Mainen suggested that he might be able to do, if further testing so indicated.

Claimant argues that the labor market survey was provided too late to give him a chance to obtain those jobs. Nevertheless, he did attempt to inquire into their availability and to assess whether he was capable of performing them. He found that many were unsuitable, given his limitations. Moreover, Claimant observes that Mr. Temple failed to take into account his psychological problems in that he suffers from depression, or Dr. Phelps' finding that he needed vocational rehabilitation.

Dr. Phelps finding that the Claimant would need vocational rehabilitation to return to full time work stands unrebutted. From the record evidence about Claimant's reactive depression, described by Dr. Phelps and noted as a question earlier by Dr. Woelflein, his demeanor when testifying at the hearing, and recent job experiences, it is clear to the undersigned that Dr. Phelps conclusion as to a need for vocational rehabilitation is right on the mark. As the Claimant stands today, he is not capable of full-time employment at even a light duty position, given his need for rehabilitation, due primarily to his reactive depression from his illness, his continuing pain, and his negative work experiences following his injury at Atkinson.[1] I believe that the Claimant can return to the workforce, given the proper rehabilitative training, and in a position within his restrictions, as determined by Dr. Phelps, but not at the present time. The record fully supports the conclusion, which I hereby adopt, that Claimant is under a temporary total disability due to the sequelae of pain and depression following his injury in July, 2000 at the Atkinson work site and requires vocational rehabilitation before reentering the workforce.

Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully

[1] Claimant tried to perform several jobs after his injury, including lighter work with Employer. Each of these jobs were essentially unsuccessful work attempts due to the Claimant's physical limitations.

itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Atkinson Construction Co., shall pay to the Claimant, Reagan E. Burrell, temporary total disability compensation pursuant to 33 U.S.C. §908(b) commencing July 20, 2000 to the present and continuing, based on the stipulated average weekly wage of $977.00;

2. The Employer shall be allowed a credit pursuant to 33 U.S.C. §903(e) for prior payments of disability compensation under the Maine Workers' Compensation Act;

3. The Employer shall be allowed an offset for the amount of the Claimant's actual earnings after he returned to work in September, 2000;

4. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury may require pursuant to 33 U.S.C. §907;

5. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

6. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

WILLIAM J. COWAN
Administrative Law Judge

Boston, Massachusetts
WJC:jal